

Remarks

Amendment to the Specification

The amendment to the specification provides an antecedent basis for amendments to the claims without introducing new matter. Entry is solicited.

Art Rejection

In response to the final rejection, Applicant has amended the claims to differentiate from the device disclosed in the GAMMENTHALER '674 patent and to improve the claims form.

Amended claim 1 is directed to the breath alcohol detection system with a breath inlet passage and with a two position valve with an inlet connected to the breath inlet passage and first and second valve outlets connected, respectively, to first and second passages. The first passage extends from the first valve outlet to atmosphere through a first restriction. The second passage extends from the second valve outlet to atmosphere through the fuel cell and a second restriction. The restrictions are essentially equal.

An actuator moves a valve member to a first position to flow breath from the breath inlet passage through the valve, a first passage and a first restriction to atmosphere. When the valve member is in this position, a second passage is disconnected from the breath inlet passage.

The actuator also moves the valve member to a second position so that breath from the inlet passage flows through the valve, the second passage, the fuel cell and a second restriction.

Breath continuously flows through the valve and one of the first and second passages so that shifting of the valve does not substantially vary the pressure in the breath inlet passage. As a result, the individual taking the breath test cannot sense when the test sample is being taken.

In contrast, GAMMENTHALER discloses a device in which the breath test sample is flowed to a fuel cell through a flow/no flow valve 20 connected to the breath inlet passage. This valve has a valve inlet and a single valve outlet and is either open to permit flow to the fuel cell or is closed to prevent flow through the valve to the fuel cell. Breath does not continuously flow through this valve. The pressure in the breath inlet passage varies when the valve is opened and closed, providing a signal to the individual taking the test that the test is being taken.

The final rejection, Page 3, paragraph 2 states that in GAMMENTHALER, valve 20 has a "first outlet" when closed and refers to breath inlet passage exit 26. See Figure 1. Exit 26 is part of the breath inlet passage. It is remote from the valve. Valve 20 has a single outlet which is connected to the fuel cell 24. When the valve is closed, no breath flows through the valve and the pressure in the passage 12 varies.

The claim 1 device distinguishes from GAMMENTHALER because breath flows continuously through the valve and then through one only of the first or second passages. These passages are distinct from the breath inlet passage.

In short, a person of ordinary skill in the breath testing art would not have found it obvious to modify GAMMENTHALER as

proposed. There is no disclosure of the claimed elements in claim 1 and nothing in the reference to support the proposed modification relied upon in the rejection. The proposed modification would not work.

The final rejection includes the following sentences:

"The passageway 26 is structurally capable when the valve is in the closed position to be a first passageway communicating with the first valve outlet to the atmosphere because all the air will pass through and as seen in figure 1. The Examiner maintains that the first restriction is the passageway would be the entrance to the inlet valve tube."

This analysis is conjectural and unrelated to the question of whether a person of ordinary skill would find it obvious to modify GAMMENTHALER to meet claim 1. The reference to "structurally capable" is misplaced. Patentability is not based on structural capacity. When the GAMMENTHALER valve is in the closed position, there is no flow through the valve.

GAMMENTHALER does not disclose or suggest the use of a two position valve in a breath test device to provide continuous flow through the valve so that there is no pressure pulse when the valve is shifted during a test.

The strained reconstruction of GAMMENTHALER appears to have been made with improper hindsight knowledge of applicant's own disclosure. The rejection is based on the reconstruction and must be withdrawn.

Independent claim 16 is similar to claim 1 and is directed to a breath alcohol detection device with a two position valve connected to a breath inlet passage with first and second passages connected to outlets in the valve and a fuel cell in the first passage. Breath flows continuously through the valve and through one only of the two passages. Shifting of the valve flows this breath through either the first or second passage, and prevents flow through the other passage.

This combination is not taught or suggested by GAMMENTHALER, as pointed out above.

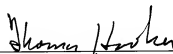
Reconsideration and withdrawal of the Section 103 rejections is solicited.

New claims 27-29 are submitted to accord applicant additional protection to his invention. Entry is solicited.

Conclusion

The amendments to the claims patentability distinguished the claims from the reference and place the application in condition for allowance. Such favorable action is solicited.

Respectfully submitted,
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